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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 693

VICTOR DECOSTA,

Petitioner,

v.

COLUMBIA BROADCASTING SYSTEM, INC., CAPITAL CITIES BROADCASTING CORPORATION and CBS FILMS, INC.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

The petition for certiorari (pp. 2, 3) attempts to present questions which completely ignore the proceedings below in the United States District Court for the District of Rhode Island, wherein only a cause of action alleging quasi-contractual obligations (unjust enrichment) or misappropriation without passing off was submitted to the jury (R. App. 14-16, 355, 356). Only this substantive claim could have been considered by the United States Court of Appeals for the First Circuit (Petition for Certiorari Appendix, pp. 6a, 7a).

The only question properly before the Court of Appeals and the only issue decided by that court was whether the trial record could support a jury award to Petitioner on

a theory of quasi-contractual liability (unjust enrichment) or misappropriation without passing off. Inherent in the reversal by the Court of Appeals is the conclusion that the trial record is completely devoid of any evidence which would support an *ex contractu* obligation of Respondents to Petitioner. Additionally, the Court of Appeals reached the completely proper conclusion that Petitioner's unprotected publication of his "ideas", whether they were unprotected or merely unprotectible, precluded Petitioner from recovering under any state law theory of misappropriation, by whatever name Petitioner's legal theories were proffered.

A fair reading of the trial record (as contained in the Consolidated Record Appendix), and the Court of Appeals opinion herein (Appendix to Petition, pp. 2a-5a) clearly establishes that Petitioner failed in his requisite burden of proof in the establishment of the necessary elements for quasi-contractual recovery. *Miller* v. *Schloss,* 218 N. Y. 400 (1916); *Puente* v. *President & Fellows of Harvard College,* 248 F. 2d 799 (1st Cir. 1957), cert. den. 356 U. S. 947 (1958).

Petitioner's main reason for the granting of certiorari appears to be that the holding of the Court of Appeals constitutes an improper application of this Court's recent rulings in *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U. S. 225 (1964) and *Compco Corp.* v. *Day-Brite Lighting, Inc.*, 376 U. S. 234 (1964), and that accordingly, this Court should use this limited quasi-contract (unjust enrichment) or misappropriation without passing off claim for the purpose of "clarifying" *Sears* and *Compco.* This contention is entirely without merit. The opinion of the Court of Appeals falls clearly within the precepts of both *Sears* and *Compco.* Respondents therefore urge that certiorari be denied absent a clear showing that the Court of Appeals holding was erroneous in denying Petitioner recovery or that the holding is in conflict with this Court or another Court of Appeals.

Statement of the Case

Petitioner's Statement of the Case (pp. 4-9) insofar as it follows the language of the opinion of the Court of Appeals (Appendix to Petition, pp. 2a-5a) is basically correct as far as it goes.

Naturally, Petitioner omits any reference to Respondents' creation and development of a television series entitled "Have Gun-Will Travel" independant of Petitioner or to Petitioner's absolute lack of privity or relationship with any of the Respondents (R. App. 77-78).

In 1956 two Hollywood writers, Herb Meadow and Sam Rolfe, submitted to Hunt Stromberg, Jr., then a Program Development Executive at Columbia Broadcasting System, Inc. (hereinafter "CBS"), an outline suggestion for a television series entitled "Have Gun-Will Travel" (R. App. 221-224). The suggestion featured a "knight errant" character named "Paladin" in a modern setting (R. App. 224-225) which was later changed at Mr. Stromberg's request to the old west (R. App. 226, 227-231, 253, 334). Thereafter a so-called pilot script was written, submitted and approved (R. App. 231-233), and (in late 1956) a pilot film produced (R. App. 295, *et seq.*).

In the pilot film the actor Richard Boone was screen-tested and costumed under the direction of Julian Claman, a staff producer for CBS (R. App. 283, 291-292, 337). For the show a calling card showing a knight chess piece with the printed words "Have Gun-Will Travel", "Wire Paladin", was designed at Mr. Claman's request by Charles Sibus of the CBS art department (R. App. 287-289, 305-307, 346-348, D. Ex. S and Y; R. App. 395, 397).

The first episode in the series was televised in September, 1957 (R. App. 107) over the CBS Television Network, including stations owned by Respondent Capital Cities Broadcasting Corporation. Thereafter other episodes, 225 in all (R. App. 328), were filmed and broadcast.

In this action commenced in June, 1963, Petitioner claimed that he created a legendary western hero named "Paladin" and that the Respondents wrongfully appropriated this idea (R. App. 14, 15). However, Petitioner introduced no evidence that he authored the creation of or even created a literary or legendary western character. His whole case was predicated on evidence that he appeared in public without remuneration beginning in the late 1940's attired in a black western outfit (R. App. 26-32, 86-87, 92-93, 100-106, 369, 389, 393), and further that he distributed uncopyrighted printed cards with the slogan "Have Gun, Will Travel" and a knight chess piece printed thereon together with the words "Wire Paladin" and uncopyrighted photographs of himself in said western outfit (P. Ex. 1, 2, 8, 15, 16, 17, 18, 19, 20, 21, 48 and 52; R. App. 369-385, 631, 632, 639 and 640), all over a period of years to the general public (R. App. 49, 51, 76, 77, 83, 89, 99). Moreover, Petitioner testified that he did not communicate his so-called idea for a black costume and calling card to anyone connected with Respondents prior to the origination of the television show (R. App. 77-78).

Petitioner probably should not be faulted for his rather one-sided statement of the case; he obviously believes it to be to his advantage. It is not; for Petitioner's assertion that Respondents did not object to the jury instruction to the effect that he was entitled to a verdict if he established that he created a novel, original and unique idea and character, that he had not abandoned said idea and character, that Respondents copied said idea and character without permission, and that Petitioner sustained damages thereby, is clearly not supported by the record. Not only did Respondents object to the above-stated portion of the Trial Court's charges to the jury (R. App. 364-365), but Respondents also timely objected to the Trial Court's denial of Respondents' requests for relevant and proper instructions (R. App. 366, 399-402).

Reasons for Denying the Writ

I. The Court of Appeals holding does not result in any conflict of decisions.

Petitioner's arguments appear to seek a sweeping appraisal and clarification of *Sears* and *Compco, supra.* However, the proper question to be presented here is not the extent to which *Sears* and *Compco* can be applied in the copyright field, but merely whether the Court of Appeals, and even perhaps by dicta, correctly applied the rationale of *Sears* and *Compco.*

The Court of Appeals properly disregarded any issue of "secondary meaning" or "passing off". These issues were only susceptible of proof under those claims reserved by the Trial Court (Pet. App. 6a, 7a). It concluded "thus, the judgment can only be supported on a rule of law that would allow recovery upon proof of creation by the plaintiff and copying by the defendants, and nothing else. We do not find such a rule in the cases cited above." [See *Lone Ranger, Inc.* v. *Cox*, 124 F. 2d 650 (4th Cir. 1942); *Chaplin* v. *Amador*, 93 Cal. App. 358, 269 Pac. 544 (1928); *Lahr* v. *Adell Chem. Co.*, 300 F. 2d 256 (1st Cir. 1962); *Metropolitan Opera Ass'n* v. *Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 793 (N. Y. Sup. Ct. 1950), aff'd 279 App. Div. 632 (1st Dep't 1951)] (Pet. App. 7a).

Before dealing with the application of *Sears* and *Compco*, one might ask what does the trial record offer in support of Petitioner's so-called "creation"? He had a black western costume, a Paladin alias, and calling cards containing the slogan "Have Gun-Will Travel", the symbol of a knight chess piece and the words "Wire Paladin"; some of the cards even contained a picture of Petitioner in costume. Photographs of this Rhode Island "Paladin" were also generally distributed. As a hobby Petitioner appeared at horseshows, rodeos and parades in and around the Provi-

dence, Rhode Island area and indiscriminately disseminated approximately 250,000 of these calling cards and pictures to anyone and everyone who might want them, all without restriction or limitation as to persons or purpose (R, App. 49, 51, 76, 77, 83, 89, 99).

The first question to be determinated is whether Petitioner's *creation* constituted an idea or literary property. If it was an idea, it was uncopyrightable and not literary property. Absent the legal requisite contractual protection or a confidential disclosure to Respondents, they were perfectly free to utilize any of his ideas.

If the *creation* achieved the dignity of literary property and was therefore copyrightable, Petitioner in failing to seek statutory protection for his property and freely publishing whatever he had without statutory requisites for protection forfeited his common law rights (see Point II, *infra*).

It is Respondents' contention that the established law of ideas precludes Petitioner from any recovery herein, irrespective of *Sears* and *Compco* (see Point II, *infra*), and that *Sears* and *Compco* merely lock doors which have long been closed.

The court stated in *Compco* at page 237:

> "Today we have held in *Sears, Roebuck & Co.* v. *Stiffel, supra,* that when an article is unprotected by a patent or a copyright, state law may not forbid others to copy that article. To forbid copying would interfere with the federal policy, found in Art. I, Sec. 8, Cl. 8, of the Constitution and in the implementing federal statutes, of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain."

It follows that state laws cannot afford legal protection to the copying of public domain material, i.e., that matter which is inherently uncopyrightable or that matter which

is copyrightable, but forfeited. Any contrary interpretation would permit perpetual protection (a) to one who is the proprietor of an uncopyrightable work or (b) to one who fails to secure statutory registration (Title 17, U.S.C., § 1 *et seq.*) for published copyrightable material. With respect to uncopyrightable works, *Sears* held the following at page 232:

> "... because of the federal patent laws a State may not, when the article is unpatented and uncopyrighted, prohibit the copying of the article itself or award damages for such copying."

The citation for this statement is a copyright decision of Judge Learned Hand in *G. Ricordi & Co.* v. *Haendler,* 194 F. 2d 914 (2d Cir. 1952). That Court of Appeals' decision held that copyrightable elements of the work were dedicated to the public upon publication of the work, and that accordingly, when the copyright on the work expired, anyone was free to actually photograph the then uncopyrightable elements. From this citation, it is crystal clear that state law cannot protect uncopyrightable matter or copyrighable matter in the public commons.

Petitioner argues at length that the Court of Appeals' application of *Sears* and *Compco* conflicts with *International News Service* v. *Associated Press,* 248 U. S. 215 (1918). While it is true that *Sears* and *Compco* did not specifically mention *I.N.S.* v. *A. P., supra,* it is apparent that *I.N.S.* v. *A. P.* cannot grant protection absent palming off or misrepresentation. The problem of any possible conflict between *Sears* and *Compco* and *I.N.S.* v. *A. P.* was dealt with in *Cable Vision, Inc.* v. *KUTV, Inc.,* 335 F. 2d 348 (9th Cir. 1964), cert. den. 379 U. S. 989 (1965). In *Cable Vision,* unfair competition and tortious interference with contractual rights was claimed by a local television station against a CATV operator. That Court of Appeals held at page 350:

> "As we read Sears and Compco, however, only actions for copyright infringement or such common-law actions

as are consistent with the primary right of public access to all in the public domain will lie.

In Compco, the court emphasized that the federal policy found in Art. I, § 8, Cl. 8 of the Constitution and in the implementing federal statutes is to allow '* * * free access to copy whatever the federal patent and copyright laws leave in the public domain.' 376 U. S. at 237, 84 S. Ct. at 782. The public domain was broadly delineated in Sears: that which is either not copyrighted, not copyrightable or on which the copyright has expired is in the public domain. 376 U. S. at 231, 84 S. Ct. 784. See also Flamingo Telefilm Sales Inc. v. United Artists Corp., 32 U. S. L. Week 2579 (May 12, 1964). Thus when an article is unprotected by a patent or copyright, state law may not forbid a person not the originator to merely copy and commercially exploit that article, for such a law would enable the originator to accomplish with the left hand of state authority what he was unable to accomplish with the right hand bearing the authority of the primary federal interest."

It went on to distinguish *I.N.S.* v. *A. P.* and perhaps even hail the present pendulum swing to the dissent of Justice Brandeis. That Court of Appeals seriously questioned the applicability of *I.N.S.* v. *A. P.* today. But regardless of that fact and just as in *Cable Vision,* the instant case is readily distinguishable from *I.N.S.* v. *A. P.* in that there is no issue present of palming off or misrepresentation. As the Court of Appeals said in *Cable Vision,* at page 351:

"Here the District Court enjoined activity that lacked the element of palming off. It is incontrovertible that all broadcasts are received and distributed by the community antenna without any modification of program content; therefore no question of 'implied misrepresentation' by failing to give the originator proper credit, a misrepresentation present in International

> News Service v. Associated Press, supra, 248 U. S. 215, 39 S. Ct. 68 (1918), is involved in this case. We are clear that there is lacking that taint 'necessary to turn a flavor into a poison' justifying judicial relief without Congressional authorization. To the extent, then, that the District Court holding extended a new protectible interest beyond what the copyright laws confer, it '* * * interfere[d] with the federal policy * * * of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain.' "

Similar applications of *Sears* and *Compco* with respect to uncopyrightable or uncopyrighted matters have been reached in *G. P. Putnam's Sons* v. *Lancer Books, Inc.*, 239 F. Supp. 782 (SDNY 1965); *Estate of Hemingway* v. *Random House, Inc.*, 49 Misc. 2d 726, 153 U.S.P.Q. 871 (N. Y. Sup. Ct. 1967); *Flamingo Telefilm Sales, Inc.* v. *United Artists Corporation*, 22 A. D. 2d 778 (1st Dep't 1964), 144 U.S.P.Q. 168.

In his petition, Petitioner devotes most of his argument to the point that *Sears* and *Compco* should not preclude recovery where there is an actual passing off or misrepresentation (absent here). Every pre *Sears* and *Compco* case cited by Petitioner in support of his contention that the *Sears* and *Compco* pre-emption doctrine should not be applied contains the present record missing elements of passing off or misrepresentation. The same holds true for each post *Sears* and *Compco* decision cited by Petitioner.

The remainder of Petitioner's argument is directed to broad generalizations involving the need for federal legislation to protect that which at present is unprotectible, and how Petitioner's undefined rights should still be protected by common law on the grounds that Petitioner has not *published* whatever it is he had.

With respect to all issues raised by Petitioner, the Court of Appeals' application of *Sears* and *Compco* is entirely

consistent with the *Sears* and *Compco* holdings and does not conflict with any subsequent holding of this Court or of any other Court of Appeals. For this reason alone, the Petition for Certiorari should be denied.

II. The Court of Appeals reversal is correct, even without reliance on *Sears and Compco*.

While it is clear that the Court of Appeals' application of *Sears* and *Compco* is correct and precludes Petitioner from any redress (see Point I, *supra*), it is Respondents' contention that Petitioner is not entitled to recovery under the single claim before this Court.

Referring to Petitioner's sole adjudicated claim (Petition for Certiorari Appendix, pp. 6a, 7a), it is clear that he is attempting to recover under a quasi-contractual theory (unjust enrichment), whereunder he must prove:

1. Independent creation of a unique and novel idea or combination of ideas,
2. reduced to concrete form, plus
3. contract protection upon disclosure to Respondents, or its equivalent, and a
4. wrongful taking of Petitioner's idea or combination of ideas by Respondents, with
5. resultant damage to Petitioner.

Absent proof of *any* of the above elements, there can be no recovery. It is Respondents' contention that Petitioner totally failed to offer proof on *all* of the following necessary elements to support such a quasi-contractual recovery:

1. *Independent creation of a unique and novel idea or combination of ideas, reduced to concrete form.*

Petitioner was admittedly not performing any literary material at any time and he did not possess scripts or re-

corded spoken lines. Petitioner had merely put together a costume and a calling card, which together with his assumed name "Paladin" were borrowed from some other source (R. App. 30-31, 36-37, 38-40, 52-53, 124-125). Petitioner created nothing which can be classified as literary in nature. His idea was never reduced to written concrete form (for the basis of a television production or any other type of dramatic performance). Even a novel abstract idea for a character does not become concrete until there is some readable expression of when, where, how (and even, why) the character will function. The very least that must be required is the outline of how the novel and concrete idea can be presented dramatically. Even then there must be detail and substance set forth in order to make the idea useful and workable.

Bowen v. *Yankee Network, Inc.*, 46 F. Supp. 62 (D. Mass. 1942);
Herwitz v. *National Broadcasting Company*, 210 F. Supp. 231 (SDNY 1962);
O'Brien v. *RKO Radio Pictures, Inc.*, 68 F. Supp. 13 (SDNY 1946);
Taylor v. *Metro-Goldwyn-Mayer Studios*, 115 F. Supp. 156 (S. D. Cal. 1953);
Plus Promotions, Inc. v. *RCA Mfg. Co.*, 49 F. Supp. 116 (SDNY 1943).

2. *Contract protection upon disclosure to Respondents or its equivalent.*

It is well established by the authorities that the disclosure of an idea, or publication of a work without first securing statutory copyright protection, deprives the originator of any rights.

Puente v. *President & Fellows of Harvard College, supra;*
Affiliated Enterprises, Inc. v. *Gruber*, 86 F. 2d 958 (1st Cir. 1936);

White v. *Kimmell,* 193 F. 2d 744 (9th Cir. 1952), cert. den. 343 U. S. 957 (1952);

Continental Casualty Company v. *Beardsley,* 253 F. 2d 702 (2d Cir. 1958), cert. den. 358 U. S. 816 (1958);

American Code Co. v. *Bensinger,* 282 Fed. 829 (2d Cir. 1922);

Jewelers' Mercantile Agency v. *Jewelers' Weekly Pub. Co.,* 155 N. Y. 241, 49 N. E. 872 (1898);

Varconi v. *Unity Television Corporation,* 173 N.Y.S. 2d 201 (Sup. Ct. 1958).

The rule was concisely set forth in the *Puente* case at page 802:

> "The unconditional public disclosure of an idea by the originator makes it the property of all and operates to deprive the originator of any further proprietary rights in it."

An idea or the expression thereof can be protected by the originator in only three ways: (1) the originator of an idea may keep it secret; (2) he may disclose it to a potential user with contract protection or its equivalent without losing rights; and (3) if he wants to publish it generally, he must put his "ideas" in some literary form and secure statutory copyright. See

> 2 Callman, *Unfair Competition and Trade-Marks,* 917-918 (2d ed. 1950),

where it is stated as follows:

> "Though the common-law protection available for ideas appears under various names, the common denominator has not yet been identified. Whether we speak of a common-law copyright, a trade secret or the rights of an inventor in his unpatented invention,

the root is always the same. We do not actually look to the nature of the copyright, trade secret, or invention, nor at their contents and their value, but merely at the *fact of their secrecy*. When secrecy disappears, the idea is available to all unless a particular legal regulation comes to the rescue. This may arise from the copyright or patent law or from a confidential or similarly special relationship." (emphasis by the author.)

There was no privity or confidential relationship (or possible equivalent) between Petitioner and Respondents in this case. In fact, Petitioner admits that he never made any disclosure of his idea(s) to Respondents. He had no contact with Respondents prior to the first television broadcast of "Have Gun-Will Travel". It is important to stress again that Petitioner is seeking recovery on a quasi-contractual (or unjust enrichment) theory, not a tort theory. Petitioner has failed to cite a single case where a quasi-contract was found to exist in an idea-theft case absent any privity or confidential relationship between the parties; this is for the simple reason that no such case exists. The law simply does not imply contracts out of the air. There must be some relationship between the parties from which a contract can be implied in law.

Assuming *arguendo* that one of the Respondents saw Petitioner in western dress, received one of the approximately 250,000 cards which Petitioner admittedly passed out indiscriminately or a picture of Petitioner in costume dress, what obligation do Respondents have to Petitioner if they incorporated some of these freely published elements into a fictitious literary characterization in a television program? It is submitted that the answer is none.

Official Airlines Schedule Information Service, Inc. v. *Eastern Air Lines, Inc.*, 333 F. 2d 672 (5th Cir. 1964);

Cobb v. *Southern Plaswood Corporation,* 171 F. Supp. 691 (W. D. Ark. 1959);

Van Rensselaer v. *General Motors Corporation,* 223 F. Supp. 323 (E. D. Mich. 1962), aff'd 324 F. 2d 354 (6th Cir. 1963);

Puente v. *President & Fellows of Harvard College, supra;*

Bowen v. *Yankee Network, Inc., supra;*

Carneval v. *William Morris Agency, Inc.,* 124 N.Y.S. 2d 319 (1953), aff'd 284 App. Div. 1041; 137 N.Y.S. 2d 612 (1st Dep't 1954);

Grombach Productions, Inc. v. *Waring,* 293 N. Y. 609; 59 N. E. 2d 425 (1944);

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Sloan v. *Mud Prods., Inc.,* 114 F. Supp. 916 (N. D. Okla. 1953);

Herwitz v. *National Broadcasting Company, supra.*

Under the law of ideas, any disclosure of an idea without contract protection or its equivalent results in a forfeiture or dedication thereof, *Bristol* v. *Equitable Life Assurance Society of New York,* 132 N. Y. 264, 267 (1892); and ideas *per se,* regardless of how concrete the form, are, not, independent of contract protection or its equivalent, protectible property at common law. *Grombach Productions, Inc.* v. *Waring, supra; Carneval* v. *William Morris Agency, Inc., supra.* Literary and artistic expression, i.e., that which is copyrightable, is property *per se* and protectible at common law up to the time of initial publication. *Palmer* v. *DeWitt,* 47 N. Y. 532, 536 (1872). It follows then that Petitioner's uncopyrightable character, characterization or idea must have fallen into the public domain during his years of non-commercial exploitation and public exhibition thereof, i.e., 1947 to 1957 (R. App. 32, 33, 38).

3. A wrongful taking of Petitioner's idea or combination of ideas by Respondents.

In order for Petitioner to recover for "idea theft", it is necessary for him to prove that the Respondents wrongfully appropriated his ideas. Petitioner presented no direct proof of copying or even access to Petitioner's ideas.

Herwitz v. *National Broadcasting Company, supra;*

Richards v. *Columbia Broadcasting System, Inc.,* 161 F. Supp. 516 (D.D.C. 1958);

Costello v. *Loew's Incorporated,* 159 F. Supp. 782 (D.D.C. 1958);

Harold Lloyd Corporation v. *Witwer,* 65 F. 2d 1 (9th Cir. 1933);

Twentieth Century-Fox Film Corp. v. *Dieckhaus,* 153 F. 2d 893 (8th Cir. 1946), cert. den. 329 U. S. 716 (1946);

Golding v. *RKO Pictures, Inc.,* 35 Cal. 2d 690, 221 P. 2d 95 (1950);

Smith v. *Berlin,* 207 Misc. 862; 141 N.Y.S. 2d 110 (1955);

Schwarz v. *Universal Pictures Co.,* 85 F. Supp. 270 (S. D. Cal. 1945);

Lapsley v. *American Institute of Certified Public Accountants,* 246 F. Supp. 389 (D.D.C. 1965);

Columbia Pictures Corporation v. *Krasna,* 65 N.Y.S. 2d 67 (1946), aff'd 271 App. Div. 1008; 69 N.Y.S. 2d 796 (1st Dep't 1947);

Pinci v. *Twentieth Century-Fox Film Corp.,* 95 F. Supp. 884 (S.D.N.Y. 1951);

Teich v. *General Mills, Inc.,* 339 P. 2d 627 (Cal. App. 1959);

Huszar v. *Cincinnati Chemical Works, Inc.,* 172 F. 2d 6, 11 (6th Cir. 1949).

Even if the "'coincidence' run riot" suggestion (Pet. App., p. 2a) is intended to infer that Respondents or one of their agents might have seen Petitioner (his picture) or his calling card, there would still be no wrongful use in that any of the ideas embodied in his appearance, card or photograph were forfeited and dedicated to the public; anyone was free to use them.

4. *Petitioner has not been damaged.*

There is not one shred of evidence in the entire trial record which supports damage to Petitioner. He did not sell a product, service or institution; he did not charge fees for appearances; he exploited only himself (R. App., p. 3a). His "totem of creation" was for personal pleasure as opposed to economic exploration. Record evidence of Respondents' gross sales in monetary terms could not support the claim of money damage.

Weitzenkorn v. *Lesser,* 40 Cal. 2d 778; 256 P. 2d 947 (1953);

Universal Pictures Co. v. *Harold Lloyd Corporation,* 162 F. 2d 354 (9th Cir. 1947);

Golding v. *RKO Pictures, Inc., supra;*

Cole v. *Phillips H. Lord, Inc.,* 262 App. Div. 116; 28 N.Y.S. 2d 404 (1st Dep't 1941);

Illinois Cent. R. Co. v. *Howard,* 196 Ind. 323; 147 N. E. 142 (1925).

The only other question raised by Petitioner is in the area of "publication". He argues that he retained common law rights in his *character* on the legal concept that there was no performance or publication of his *character,* photographs or business cards sufficient to constitute a forfeiture or dedication to the public.

The legal rationale that public performance in and of itself does not constitute a general publication is obviously

inapplicable to this case. The principle can only apply to performances of literary material, and that material which is not already published.

Ferris v. *Frohman*, 223 U. S. 424 (1912);
Nutt v. *National Institute Incorporated for the Improvement of Memory*, 31 F. 2d 236 (2d Cir. 1929);
Continental Casualty Company v. *Beardsley*, *supra*.

There was no testimony in the record of this case from which the jury could find that Petitioner performed literary material. He admitted that he had no scripts (R. App. 84). In addition, the only possible literary material which he possessed, i.e., his calling card, or possibly his photographs, were both printed and published by circulation without restriction. Therefore, under no conceivable view of the evidence could it be concluded that the claimed rule on public performance was applicable to this case.

Even with respect to Petitioner's so-called performance, the Court of Appeals rationale is also correct. Performance, while it may not divest a proprietor of statutory rights, does constitute publication and hence, divestment of common law rights in the work performed.

Shapiro, Bernstein & Co. v. *Miracle Record Co.*, 91 F. Supp. 473 (N. D. Ill. 1950);
Hirshon v. *United Artists Corp.*, 243 F. 2d 640, 644 (D. C. Cir. 1957);
McIntyre v. *Double-A. Music Corp.*, 166 F. Supp. 681 (S. D. Cal. 1958);
Mills Music, Inc. v. *Cromwell Music, Inc.*, 126 F. Supp. 54 (SDNY 1954).

CONCLUSION

The Court should deny the Writ of Certiorari.

Respectfully submitted,

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